LIBRARY
EME COURT, U. S.

75-416

Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-2043

BERNARD MOSKOWITZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SIDNEY A. SOLTZ
Attorney for Petitioner
19 West Flagler Street
Miami, Florida 33130

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
ARGUMENT	7
CONCLUSION	10
CERTIFICATE OF SERVICE	11
APPENDIX A—Opinion of Court Below	App. 1

TABLE OF AUTHORITIES AND CASES CITED

Case	Page
Boyd v. United States, 142 U.S. 450, 12 S.Ct. 292, 35 L.Ed. 1077	6, 7
Boyer v. United States, 132 F.2d 12 (D.C.)	7
Michelson v. United States, 335 U.S. 469	6, 8
Rodriguez v. United States, 474 F.2d 587	8
United States v. Goodwin and Nail, 470 F.2d 893 (CA-5)	8

in the
Supreme Court
of the
United States

OCTOBER TERM, 1975

NO. 75-2043

BERNARD MOSKOWITZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 25, 1975.

CITATIONS TO OPINIONS BELOW

The Decision of the Fifth Circuit is found in Appendix A hereof. The Decision being a per curiam affirmance without Opinion it is not reported in the official report.

JURISDICTION

The judgment of the Court of Appeals was entered on August 25, 1975. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

I.

THAT THE LOWER COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY AND EXHIBITS BOTH ON THE GOVERNMENT'S CASE-IN-CHIEF AND ON REBUTTAL IN CONNECTION WITH AN ALLEGED UNRELATED CRIMINAL ACT AND CONVERSATION BETWEEN THE DEFENDANT AND THE GOVERNMENT'S WITNESS IN CHIEF, WHICH ACT AND CONVERSATION TOOK PLACE MORE THAN ONE YEAR AFTER THE ALLEGED CRIMINAL ACTS HEREIN.

STATUTE INVOLVED

The statutory provision involved herein is Title 21, U.S.C., Section 841(a)(1) which states as follows:

> "§ 841. Prohibited acts A—Unlawful acts
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or . . ."

STATEMENT OF THE CASE

The Petitioner was indicted by a Federal Grand Jury in the Southern District of Florida on October 10, 1974, on a Three Count indictment. Counts I and II of said indictment alleged that on or about the 13th day of October 1972 and the 18th day of October 1972, respectively, the defendant knowingly and intentionally distributed a controlled schedule II narcotic in violation of Title 21, U.S.C., Section 841(a)(1).

Count III of the indictment alleged that the defendant did on or about April 10, 1973, acquire the same controlled narcotic in violation of Title 21 U.S.C., Section 843(a)(3), this Count was dismissed by the Court at the close of the Government's case-in-chief and is not pertinent to the issue herein.

The trial of the case commenced on December 16, 1974, before a jury in Miami, Florida.

The chief witness against the defendant was a Fred Bitz, admitted drug addict, who testified he had met the defendant in early 1972 and between that time and May of 1973 the defendant filled approximately one hundred prescriptions for him some of which were good and some of which were forged.

He then testified that the defendant filled two prescriptions, which are the subject matter of this case, one on October 13, 1972, and one on October 19, 1972, which he alleged he had forged on prescription blanks stolen from the Clinica Calle 8, a Latin Clinic.

The witness was then asked by government counsel what he had told the defendant about the two prescriptions and he answered, "I just took them, handed them to Bernie, had them filled." Government counsel then asked him the following, "Did you tell him anything?" To which he replied, "Nothing out of the ordinary."

After the witness testified regarding the above two prescriptions, and still on the Government's case-in-chief, a Proffer was made by the Government regarding conversations the witness had with the defendant on or about November 13, 1973, more than one (1) year after the date of the alleged criminal activity herein. This conversation concerned the alleged extortion by the defendant of the witness in which the defendant was alleged to have extorted $1,400.00 from the witness in return for which he would destroy or give the witness all of the prescriptions he had filled for him which were in his files. A timely objection was made to this Proffer, which objections was overruled and the witness was permitted to testify, before the jury, regarding this subsequent conversation.

At the close of the Government's case-in-chief, the defendant took the stand to testify in his own behalf and he testified that he did not know whether he had personally filled the two prescriptions as charged in the indictment as he had had two pharmacists working at the time the prescriptions were allegedly filled and had little to do with the pharmacy department until February of 1973.

He further testified that he had no knowledge of ever having filled forged prescriptions for Fred Bitz until late April or early May of 1973 when he discovered that Bitz was forging prescriptions, at which time he confronted Bitz with this information and refused to fill any more prescriptions for him.

Upon cross-examination Government counsel, over the defendant's objections, examined him in connection with the alleged extortion attempt which took place November of 1973.

After the defendant rested, Government counsel then offered three rebuttal witnesses, all of whom were called for the purpose of introducing cassette tapes and/or transcripts of the two conversations the defendant had with the witness, Bitz, in November of 1973 regarding an alleged extortion attempt.

The defendant objected to these Exhibits being offered into evidence but the Court received into evidence the cassette tape of the November 17, 1973, conversation wherein the witness, Bitz, had gone to the defendant's place of business and either received or destroyed various forged prescriptions and gave the defendant $1,400.00.

This cassette tape was then played to the jury, although nowhere in the tape was there any evidence or statement to show that the defendant had any knowledge of any forged prescriptions prior to November of 1973. The case was then presented to the jury, which after deliberation returned its verdict of guilty to Counts I and II of the indictment.

The Court on February 28, 1975, entered its judgment and sentenced the defendant to a period of imprisonment of eighteen (18) months on both Counts plus a three (3) year special parole term and under the split sentence provision suspended twelve (12) months of the confinement and the special parole term and placed the defendant on two (2) years probation to commence upon his discharge, the sentence on both Counts to run concurrently.

The Defendant then appealed to the United States Court of Appeals for the Fifth Circuit and the Court of Appeals confirmed the convictions without opinion.

REASONS FOR GRANTING THE WRIT

The reasons relied on for the allowance of the Writ are as follows:

The issue involved raises a substantial and important question of Federal Constitutional Law as to whether or not the defendant was given a fair trial and the affirmance of the defendant's convictions appears to be in direct conflict with the Decisions of this Court in *Michelson v. United States*, 335 U.S. 469, and *Boyd v. United States*, 142 U.S. 450.

ARGUMENT

THAT THE LOWER COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY AND EXHIBITS BOTH ON THE GOVERNMENT'S CASE-IN-CHIEF AND ON REBUTTAL IN CONNECTION WITH AN ALLEGED UNRELATED CRIMINAL ACT AND CONVERSATION BETWEEN THE DEFENDANT AND THE GOVERNMENT'S WITNESS IN CHIEF, WHICH ACT AND CONVERSATION TOOK PLACE MORE THAN ONE YEAR AFTER THE ALLEGED CRIMINAL ACTS HEREIN.

It is a fundamental rule of criminal law that the guilt or evidence of another offense cannot generally be proven to show guilt of the offenses charged in an indictment, *Boyd v. United States*, 142 U.S. 450, 12 S.Ct. 292, 35 L.Ed. 1077, unless such evidence tends *directly* to prove guilt of the crime charged or to establish the absence of mistake or accident, or where the crime charged and the other offenses are closely related, *22 C.J.S. Crim. Law §683*, and the Defendant contends that none of the above exceptions apply to the facts in the instant case, especially in view of the lapse of time between the alleged offense and the alleged conversation of November 1973. In *Boyer v. United States*, 132 F.2d 12 (D.C.), the Court stated:

> "The fact that intent is in issue is not enough to let in evidence of similar acts unless they are so connected with the offense charged *in point of time and circumstances* as to throw light upon the intent." (Emphasis Supplied)

In *Rodriguez v. United States*, 474 F.2d 587, the Court held:

> ". . . Although evidence introduced in a criminal trial generally should relate only to the specific offense charged, prior or subsequent incidents may be introduced to establish that a defendant possessed a requisite knowledge or that there is a consistent pattern, scheme of operations, or similarity of method . . ."
>
> "The elements which control the admissibility of the subsequent act in this case are the similar nature and *close proximity of the two events.*" (Emphasis Supplied)

See also *United States v. Goodwin and Nail*, 470 F.2d 893 (CA-5). Further, this Court in *Michelson v. United States*, 335 U.S. 469, wrote . . .

> ". . . On the prosecution's case-in-chief, the state may not show defendant's prior trouble with the law, *specific criminal acts* or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime . . ." (Emphasis Supplied)

Yet the Court permitted the prosecutor on his case-in-chief to question the witness, Bitz, about conversations regarding specific criminal acts which took place more than one (1) year after the acts alleged in the indictment.

Nowhere in connection with the conversations, tapes and/or evidence of the November 1973 conversations was there any evidence to show knowledge on the part of the defendant as of October 1972. It should be clear that the evidence regarding the November 1973 alleged extortion attempt had no probative value to show knowledge by the defendant one (1) year previous and the practical effect of this evidence could only have inflamed or prejudiced the jury and it should have been excluded from their consideration.

CONCLUSION

In view of the foregoing it is respectfully submitted that this Petition should be granted.

Respectfully submitted,

SIDNEY A. SOLTZ

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this ____ day of _____, 1975, upon the following person by depositing four copies of same addressed to them in the United States mail with sufficient air mail postage prepaid:

Solicitor General
United States Department of Justice
Washington, D.C. 20530

_____

Of Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-2043
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

BERNARD MOSKOWITZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 25, 1975)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-416

BERNARD MOSKOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a pharmacist, contends that evidence of another crime was improperly received into evidence to show that he knew that certain prescriptions filled by him were forgeries.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts[1] of having knowingly and intentionally distributed dilaudid, a schedule II narcotic, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of eighteen months' imprisonment, to be followed by a special parole term of three years. Imposition of all but six months of the sentence was subsequently suspended, and petitioner was placed on two years' probation to begin at the time of his discharge. The court of appeals affirmed *per curiam* (Pet. App. 1).

[1]Count III of the indictment, alleging a violation of 21 U.S.C. 843 (a)(3), was dismissed by the trial court at the close of the government's case.

The evidence at trial showed that on October 13 and 19, 1972, petitioner, a Miami pharmacist, filled a dilaudid (a narcotic analgesic) prescription for Fred Bitz, a narcotics addict who had written the prescription himself using a form pad stolen from a Miami clinic (Tr. 37-38, 50-51, 82). Before filling the October 13 prescription, petitioner telephoned the clinic from which the pad had been stolen and was told that the doctor whose name Bitz had forged on the form had never worked at the clinic. Petitioner nonetheless filled the prescription, as well as a similar prescription given to him by Bitz on October 19 (Tr. 50-53, 102).

The pattern of petitioner's dealings with Bitz also demonstrated that petitioner had good reason to believe that the prescriptions given to him by Bitz had been forged. Between early 1972 and May 1973, petitioner filled for Bitz approximately sixty forged prescriptions for such controlled substances as dilaudid, morphine sulfate, qualude, and tuinal (Tr. 38-39, 42-43, 45-46, 58). Petitioner sometimes filled Bitz's prescriptions as often as three or four times a week (Tr. 45). On at least one occasion besides October 13, 1972, petitioner filled a prescription for Bitz after having determined by telephone that it was fraudulent (Tr. 54-56).

On direct examination, Bitz testified that in November 1973 petitioner had extorted $1,400 from him in exchange for returning forged prescription forms which had been retained in the pharmacy's files (Tr. 70-72). Petitioner denied that he had ever extorted money from Bitz (Tr. 275-276, 278-283). In rebuttal, the government played for the jury a tape recording of the extortion payoff (Gov. Exh. 8), which had been made with Bitz' consent (Tr. 345-346).

Petitioner's contention that the trial court erred in permitting evidence to be introduced concerning the ex-

tortion attempt is without merit. Evidence of other crimes may be introduced to established that a defendant possessed the requisite knowledge to commit an offense or to demonstrate the defendant's *modus operandi*. *E.g., United States* v. *Goodwin*, 470 F.2d 893, 899 (C.A. 5), certiorari denied, 411 U.S. 969; see also *United States* v. *Pennick*, 500 F.2d 184, 187 (C.A. 10), certiorari denied, 419 U.S. 1051; *United States* v. *Rodriguez*, 474 F.2d 587, 590 (C.A. 5); *Reid* v. *United States*, 334 F.2d 915, 918 (C.A. 9). Whether the probative value of such evidence is outweighed by its prejudice to the defendant is a determination properly left to the sound discretion of the trial judge. See, *e.g., United States* v. *Rodriguez, supra*, 474 F.2d at 590.

The court did not abuse its discretion in the present case in allowing the government to introduce evidence of petitioner's extortion of money from Bitz. The extortion was closely related to and grew out of petitioner's filling of forged prescriptions for Bitz. Standing alone, the extortion did not prove that petitioner knew that the prescriptions specified in the indictment were forgeries, but it constituted a significant element in the pattern of conduct which cumulatively demonstrated that fact.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

---

[2]Petitioner's reliance on *Boyd* v. *United States*, 142 U.S. 450, and *Michelson* v. *United States*, 335 U.S. 469, is misplaced. In *Boyd*, this Court reversed the defendant's conviction because the trial court had permitted testimony to be received concerning crimes which, in contrast to the situation here, had no bearing on the offense charged. In *Michelson*, this Court held that a character witness may be cross-examined concerning his knowledge of the accused's criminal record.